FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 717

WILLIAM H. CALLY, individually and as assignee, owner and on behalf of the owners of 17,300 shares of the common stock of the Superior Sugar Refining Company,

Respondent,

against

ALBERT ELGENHEIMER,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 717

WILLIAM H. CALEY, individually and as assignee, owner and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company,

Respondent,

against

ALBERT FLEGENHEIMER,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE RESPONDENT IN OPPOSITION.

JURISDICTION

The respondent does not believe that the Supreme Court of the United States should take jurisdiction of this case for the following reasons:

(1) The record presents no substantial federal question.

(2) The federal question was not properly raised in either the trial court or in the Supreme Court of Wisconsin.

(3) The federal question presented in the petition for certiorari was not decided by the Supreme Court of Wisconsin.

(4) Wisconsin Statute 263.12 is a procedural statute and its construction by the Wisconsin Supreme Court presents no federal question.

(5) The only questions raised in the Supreme Court of Wisconsin refer to a violation of the Wisconsin Constitution. This does not present a federal question.

MANNER IN WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE FIRST RAISED

The petitioner contends that the federal questions were first raised on a motion for rehearing in the Supreme Court of Wisconsin.

Supreme Court Rule 23 (f) requires that the Petition for Certiorari shall contain specific reference to the record, with pertinent quotations from the record as will show that the federal question was timely and properly raised. This the petitioner has failed to do. Moreover, a careful examination of his argument on motion for rehearing in the Supreme Court of Wisconsin reveals that the Federal Constitution is not cited in the index or mentioned anywhere in the argument. Instead, the argument is made that the uncertainty as to the identity of the plaintiff violates the Wisconsin Constitution. (See Motion for Rehearing, in Supreme Court of Wisconsin, page 23)

ARGUMENT

The Supreme Court of Wisconsin in its opinion indicated that the plaintiff may have attempted to qualify in one of the following ways:

1. Under Wisconsin Statutes 260.12 giving one person the right to sue for a class.

2. Under Wisconsin Statutes 260.13 as the real party in interest.

3. Under Wisconsin Statutes 260.15 as trustee of an express trust.

The original complaint set forth that William Caley was suing in his own behalf and as assignee and on behalf of owners of 17,396 shares of stock of the Superior Sugar Refining Company.

This complaint was served on November 26, 1956. On April 19, 1957 an answer and counterclaim was served. On January 22, 1958 an adverse examination was had of the plaintiff. As the Supreme Court said (98 NW 2nd at 482) the form of the assignments was made known to the defendant at that time. He also knew the names of the assignors and the number of shares each had assigned. On May 26, 1958 an Amended Answer and Counterclaim was filed. On July 21, 1958 the case was set for trial on August 26, 1958. On August 8, 1958 the defendant made his first motion that assigned causes of action be stricken from the complaint. This was denied by the trial judge because it was lacking in merit and came too late (98 NW 2nd at 483) and he set the trial for September 17, 1958.

On October 29, 1958 the plaintiff filed a Bill of Particulars. In this Bill he set forth that the owners of 17,787 shares of stock in Superior Sugar Refining Company had

assigned their claims to him. The names and addresses of the stockholders and the number of shares they owned was set forth in Schedule "A" of Plaintiff's Bill of Particulars (Appellant's Appendix, Pages 130-133). The plaintiff also set forth that the total number of shares that Albert Flegenheimer had optioned came to 18,564 shares. The plaintiff set forth in Schedule "B" of the Bill of Particulars the names and addresses and stockholdings of shareholders of 777 shares that the plaintiff did not purport to represent. If there had been any question in this Petitioner's mind about this being a class action it was resolved at this time because Caley did not attempt to act for all of the members of a class and the trial court so found.

On October 30, 1958 the defendant again moved to amend his pleadings to plead to assigned causes of action (Respondent's Exhibit "A", Record pages 225 and 226). This was denied on November 3, 1958 on the ground that it was filed too late (Respondent's Exhibit "B", Record page 260). The Court also agreed to take cognizance of the facts in the affidavit of defendant's counsel and plaintiff's Bill of Particulars even though not set up in the pleadings.

The Supreme Court held that the defendant's objections in the later stages of the action as to plaintiff's capacity to sue came too late under Section 263.12. The trial court had previously ruled twice, immediately before trial, that these objections came too late. If the petitioner had felt that the trial court's action in denying these two motions after an answer had been filed, because it was too late, raised a federal question, he should have raised it at that time.

The Wisconsin Court would not consider the constitutionality of Section 263.12 where it had not been raised in the trial court. *State ex rel Nelson v. Rock County*, 73 NW 2nd 564, 271 Wis. 312; *Dostal v. Magee*, 77 NW 2nd 604, 273 Wis. 228.

Since the constitutionality of Wisconsin Statute 263.12 was not properly presented to the Supreme Court of Wisconsin and was not ruled upon by that court, the question should not be considered by this court. *Hartford Life Insurance Company v. Johnson*, 249 U. S. 490, 39 Supreme Court, 336.

There is no uncertainty as to the judgment in the case. The plaintiff recovered $2.00 a share for 17,787 shares of stock. The assignments showing the names of the shareholders and the number of shares each owned were introduced on the trial.

The defendant made no objection to the introduction of the assignments into evidence based on plaintiff's incapacity to sue, except as to those assignments made by administrators, executors or trustees (Record pages 471, 476, 497, 498, 507, 508, 509, 511, 519 and 520).

They were the same persons set forth in Exhibit "A" of the Plaintiff's Bill of Particulars. No judgment was rendered for the owners of 777 shares covered in Schedule "B" who had also optioned their stock to Albert Flegenheimer but who did not assign to William Caley. This clearly disposed of the question of a class action. The defendant is adequately protected against any further action by the stockholders for the balance due them.

The petitioner takes the position that the Wisconsin Supreme Court is talking about the judgment rendered when they discuss the plaintiff's capacity to sue (98 NW.

2nd at page 482). Quite clearly, they are talking about pleadings prior to trial and pointing out that if the defendant wanted to determine plaintiff's exact capacity he should have done so before filing an answer. The provisions of Wisconsin Statute 263.12 are procedural and quite common in the United States.

The general rule is stated in Vol. 67 C. J. S. Page 1112:

> "The objection of lack of legal capacity to sue may be waived by failure to raise it at the proper time and in the proper manner, as by failure to interpose a proper and sufficient demurrer or answer."

The cases cited by petitioner have no relation to the judgment in this case which is definite and clearly not a judgment in a class action. The distinction has been made in Wisconsin between cases where the capacity of the plaintiff is in doubt, and the cases where he has no capacity to sue. In the latter instance the Court has said in the case of *Neuser v. Thalen, et al*, 244 NW 801; 209 Wis. 262:

> "The objection that the cause of action lies in favor of the personal representative of a deceased person and not in the person suing goes to the sufficiency of the complaint and not to the want of capacity to sue, so that it is not waived by failing to raise it by answer or demurrer under Sections 263.06, 26311 and 263.12 Stats."

This rule is also stated in Vol. 67 of C.J.S. Page 1113, Sec. 109:

> "Where the objection is one going to the existence of the cause of action as distinguished from the legal capacity to sue, it is not waived by failure to demur on the ground of incapacity."

In the instant case the only argument by petitioner goes only to the plaintiff's capacity to sue and not to the existence of a cause of action. This question was waived under Wisconsin Statute 263.12 as being raised too late. The judgment rendered was for the plaintiff, William Caley, for $2.00 a share for the 17,787 shares that he represented by assignments. The judgment did not affect the holders of the 777 shares that he did not purport to represent. Both the plaintiff and the defendant contended in the Supreme Court of Wisconsin that this was not a class action because Caley did not represent all of the members of the class.

In the case of *Fox v. McGrath* (152 Federal 2nd 616, at page 618) in connection with a claim of denial of due process, the Court discussed the defense of real party in interest:

> "Generally the defense that plaintiff is not the real party in interest is not jurisdictional but is waivable by the parties through failure to make claim therefor.
>
> "Where action was brought on a genuine debt, a judgment entered in favor of plaintiff's assignee was entered in favor of the real party in interest, and judgment was res judicata as to the original plaintiff and assignee as well as debtor and its creditors.
>
> "As the cases point out, a defendant is not interested in the assignment beyond securing his own protection from repeated claims. *Smith v. Zalinski*, 94 N.Y. 519, 522. When he secures that protection his needs should be satisfied."

The petitioner claims that the judgment is ambiguous. It is a money judgment for William Caley for $35,574.00 plus interests and costs against Albert Flegenheimer. There can be no question that if this judgment is satisfied, none of these stockholders could maintain an action

against Albert Flegenheimer to again collect the balance of $2.00 a share.

The petitioner here argues the res judicata effect of this judgment on an action pending in United States District Court for the Western District, Northern Division, of Michigan. The respondent respectfully urges that this is a proper question for the District Court to consider if and when such a defense is raised. Petitioner states that the defendants in that action assert as a class that they are entitled to a res judicata effect of their Wisconsin judgment. The defense of res judicata has not been raised. The defendants have not and do not intend to claim the benefits of a class action judgment. If the judgment of dismissal of the counterclaim on its merits is void, as petitioners claim, that is for the District Court to determine and is not proper in this petition for certiorari.

Wisconsin Statute 263.12 is a procedural statute and it would seem that the holding in the case of *Texas & New Orleans Railroad v. Fannie Miller et al*, 55 L. Ed. 790 and cases cited would indicate that questions which relate solely to state practice do not present federal questions.

The Supreme Court of Wisconsin did not pass on any federal question. The question set forth in the petition for writ of certiorari was not presented to the Supreme Court of Wisconsin. This Court held in *Godchaux v. Estopinal*, 251 U.S. 179, 40 S. Ct. 116 as follows:

> "To give the Federal Supreme Court jurisdiction to review the judgment of a State Court upon writ of error, the essential federal question must have been specifically set up there at the proper time and in the proper manner, and if first presented in a petition for rehearing to the State Court of last resort, it comes too late, unless the Court actually entertains the petition and passes upon the point."

The petitioner's motion for rehearing in the Supreme Court of Wisconsin does not mention the Federal Constitution (page 23) but does specifically set forth the provisions of the Wisconsin Constitution. The motion does refer broadly to a "due process clause" but the Constitution of the State of Wisconsin has a due process clause. See Article 1, Section 22 of Wisconsin Constitution and the discussion in *Ekern v. McGovern*, 142 NW 595 at page 619, 154 Wis. 157). This would seem to put the matter squarely under the rule of *Bowe v. Scott*, 233 U.S. 658, 58 L. Ed. 1141.

> "An allegation that a municipal ordinance is void as an attempt to take property without 'due process of law' is not sufficient to raise a federal question which will support a writ of error from the Federal Supreme Court to a state court, where no reference to the Constitution of the United States is made, and no express rights thereunder are asserted, since the contention will be regarded as referable solely to the state constitution if that constitution contains a due process clause."

The petitioner's claim of unconstitutionality raised in the Supreme Court of Wisconsin in his motion for rehearing does not raise a federal question.

For the foregoing reasons the petition for certiorari should be denied.

MICHAEL J. ANUTA
Attorney for Respondent.

Of Counsel:
LUNDGREN & SAWYER
EASTMAN, ROSE & FALLER

(EXHIBIT "A")

STATE OF WISCONSIN

IN CIRCUIT COURT FOR BROWN COUNTY

WILLIAM H. CALEY, individually and as Assignee, owner and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company, *Plaintiff*, vs. ALBERT FLEGENHEIMER, *Defendant*.	DEFENDANT'S AFFIDAVIT AND ORDER TO SHOW CAUSE FOR LEAVE TO AMEND

STATE OF WISCONSIN } SS.
MILWAUKEE COUNTY }

HENRY C. FRIEND, being first duly sworn, on oath deposes and says that he is the defendant's attorney in the above entitled action, that he is authorized to make this affidavit in his behalf, and that he does so because the defendant is absent from Milwaukee County;

That the defendant's answer and counterclaim should be amended in the following respects, towit:

1. To allege that although the defendant made a deposit of $4.00 per share for 2,665 shares of the capital stock of the Superior Sugar Refining Company, as stated in paragraph 4 of his amended answer, he acquired only 976 shares from the plaintiff and his assignors, and acquired the remaining 1689 shares from other persons.

2. To allege that although the defendant suffered a loss in excess of $10,660.00, as stated in paragraphs

numbered 24 and 25 of defendant's counterclaim, only $3,904.00 thereof represents sums paid to the plaintiff and his assignors, and that his prayer for damages should be amended accordingly;

3. That in paragraph 1 (d) of the plaintiff's Bill of Particulars, which was served upon affiant on the 29th day of October, 1958, the plaintiff alleges that he is bringing a class action, whereas, the plaintiff's complaint reads as a complaint upon assigned causes of action; and that if the plaintiff is thus to change his theory of pleading, the defendant should have leave to plead in answer thereto;

4. That in paragraph 1 (a) of the said Bill of Particulars the plaintiff alleges that he brings this action as executor of the estate of Emaline Caley, who owned 533 shares of stock of the Superior Sugar Refining Company, and that the defendant should have leave to plead in answer thereto to show that the estate of the said Emaline Caley is being probated in a foreign jurisdiction, to-wit: the State of Michigan, and to put at issue whether the foreign executor is qualified to proceed in the courts of the State of Wisconsin;

5. To make other changes in the defendant's pleading.

WHEREFORE, defendant prays that the court issue an order requiring the plaintiff to show cause, if any he has, why the defendant shall not have leave to amend his pleadings, and for such other relief as the court may deem fitting.

Henry C. Friend

Subscribed and sworn to before me
this 30 day of Oct., 1958.

George C. Kunele
Notary Public, Waukesha Co., Wis.

EXHIBIT "B"

STATE OF WISCONSIN BROWN COUNTY

CIRCUIT COURT

WILLIAM H. CALEY, individually and as Assignee, owner and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company,
Plaintiff,

vs.

ALBERT FLEGENHEIMER,
Defendant.

ORDER DENYING DEFENDANT'S APPLICATION FOR LEAVE TO AMEND HIS PLEADINGS

Upon reading and filing the defendant's affidavit and order to show cause why he should not be given leave to amend his pleadings, and upon all the files, records and proceedings herein, the plaintiff appearing by Eastman, Rose & Faller and Lundgren & Sawyer, his attorneys, and the defendant appearing by Henry C. Friend, his attorney,

IT IS HEREBY ORDERED:

That the defendant's application be and it hereby is denied for the reason that it was filed too late.

IT IS FURTHER PROVIDED:

That the Court will take cognizance of the facts alleged in the defendant's supporting affidavit and in the plaintiff's amended Bill of Particulars as they may ap-

pear at the time of trial, notwithstanding the allegations in the pleadings of the respective parties.

Dated this ..... day of November, 1958, as of the 3rd day of November, 1958, nunc pro tunc.

BY THE COURT:

CIRCUIT JUDGE